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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY FRANCIS MARKHAM,

Defendant and Appellant.

D056185

(Super. Ct. No. SCD219732)

APPEAL from a judgment of the Superior Court of San Diego County,  
Gregory W. Pollack, Judge. Affirmed in part, and reversed in part.

In a bifurcated trial, defendant Anthony Markham admitted he had two prior convictions for driving under the influence of alcohol. A jury then convicted Markham of one count of driving under the influence of alcohol (Veh. Code,<sup>1</sup> § 23152, subd. (a) - D.U.I.) and a second count of driving with a blood alcohol level of 0.08 percent or greater (§ 23152, subd. (b)). The jury also found Markham had a blood alcohol concentration of

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<sup>1</sup> All statutory references are to the Vehicle Code unless otherwise specified.

0.15 percent or more within the meaning of section 23578. At sentencing, Markham received 30 days in jail, followed by a minimum of 150 days at a residential treatment facility. The sentencing court granted Markham probation for five years under section 23600, subdivision (b)(1), suspended his driver's license for five years, and required him to pay \$2,674 in fines and fees. Markham appeals the probationary conditions, contending the court erred by: (1) suspending his driver's license for five years; and (2) failing to list each fine and fee individually and separately. We affirm in part, and reverse in part.

#### STATEMENT OF THE FACTS

On January 6, 2009, Markham and his partner decided to make some home improvements. The undertaking eventually became frustrating, and the two began to quarrel. Markham then left home, upset and eager to "check out and get drunk."

Later that night, Markham drove his car to a cul-de-sac near his home. He struggled to park his car upon arrival, moving it several times and backing into garbage cans. A concerned resident of the street, Steve Baumer, watched from his home as Markham floundered. Baumer eventually called the police.

When the police arrived, they found Markham sitting in the driver's seat of his car. The officers smelled alcohol, noticed Markham's slurred speech, and saw opened bottles of wine in the car. At that point, the officers tried to administer a field sobriety test, but Markham refused to cooperate. The officers then arrested Markham and brought him to headquarters to conduct a breathalyzer test. The test results showed Markham had a blood alcohol concentration of 0.25 percent and 0.24 percent.

## DISCUSSION

### I

#### *SUSPENSION OF MARKHAM'S DRIVER'S LICENSE*

Markham contends the court erred in suspending his driver's license for five years. Specifically, Markham asserts section 13352, subdivision (a)(5) authorized revocation of his license for three years only.

At the outset, we address whether Markham forfeited his right to appeal the suspension of his driver's license by not objecting at sentencing. A defendant forfeits his right to appeal probationary terms where he fails to object at the time of sentencing. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) As Markham notes, however, a defendant does not forfeit his right to appeal an unauthorized sentence. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) An unauthorized sentence is an "obvious legal error" presenting a pure question of law that is " ' "clear and correctable independent of any factual issues presented by the record at sentencing." ' " (*Ibid.*)

The court did not impose an "unauthorized sentence" in suspending Markham's driving privileges for five years. Section 13352, subdivision (a)(5) required the court to suspend Markham's driver's license for at least three years. It did not operate to strip the court of its discretion to select enhanced terms if the circumstances of the case so warranted. Because the court did not impose an unauthorized sentence, Markham forfeited his right to appeal the five-year suspension of his driving privileges by failing to object at sentencing. Even assuming Markham did not forfeit this claim, his contentions have no merit.

A sentencing court has broad discretion in determining the conditions of a defendant's probation. (Pen. Code, § 1203.1, subd. (b); *People v. Warner* (1978) 20 Cal.3d 678, 682-683.) We review a sentencing court's selection of probationary conditions for abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.) Under this standard, we reverse only if the court acted arbitrarily or capriciously, or " 'exceed[ed] the bounds of reason.' " (*People v. Welch, supra*, 5 Cal.4th at p. 233.)

A defendant convicted of a third D.U.I. loses the privilege to operate a vehicle for three years. (§ 13352, subd. (a)(5).) If the defendant is convicted of driving with a blood alcohol concentration of 0.15 percent or more, a court may consider "special factor[s] that may justify . . . additional or enhanced terms and conditions of probation." (§ 23578.) A court should select additional or enhanced terms of probation that ensure the safety of the public and rehabilitate the offender, the two primary goals of probation. (See Pen. Code, § 1203.1, subd. (b).)

Markham correctly notes his conviction for a third D.U.I. offense authorized the court to suspend his driver's license for three years under section 13352, subdivision (a)(5). However, the court was not limited to that statutory authorization in selecting the time period for which Markham's driver's license would be suspended. The jury's true finding that Markham drove with a blood alcohol concentration above 0.15 percent within the meaning of section 23578 allowed the court to select additional or enhanced terms of his probation. At sentencing, the court satisfied section 23578 by noting several factors that justified suspending Markham's driver's license for a time period beyond that which section 13352 prescribed. These factors included Markham's drinking problem,

the causal link between his depression and drinking habits, and his capacity to injure himself or others if allowed to drive. Under these circumstances, the court did not abuse its discretion in suspending Markham's driver's license for five years.

## II

### *FINES AND FEES*

Markham contends, and the Attorney General concedes, the court erred in failing to set forth each fine and fee individually and separately in the minute order. We accept the Attorney General's concession.

A sentencing court must set forth the statutory basis for each fine and fee in the abstract of judgment. (Pen. Code, § 1213; *People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Where the court does not issue an abstract of judgment, it must provide a commitment document bearing the form and content required for the abstract. (Pen. Code, § 1213, subd. (b).) A court may use a minute order as the commitment document as long as the first page is "identical in form and content to that prescribed . . . for an abstract of judgment." (*Ibid.*) A minute order that omits the statutory bases of the fines and fees does not satisfy this requirement. (*People v. Eddards* (2008) 162 Cal.App.4th 712, 718.)

In this case, the court's minute order failed to set forth the statutory bases of the fines and fees the court ordered Markham to pay. In the minute order, the court ordered \$2,674 in fines and fees, a total that "included" a restitution fine, security fee, administrative fee, assessment fee, and accounts receivable fee. The court's failure to list the statutory bases of these fines and fees prevents Markham from confirming the amount

of his D.U.I. fine is within the authorized statutory range. (§ 23546, subd. (a) [authorizing fine of not less than \$390 nor more than \$1,000].) Thus, this matter should be remanded so that the court may specify the individual fines and fees.

The Attorney General concedes this much, but argues Markham forfeited his right to raise this claim on appeal by failing to object at sentencing. Generally, a defendant forfeits his right to appeal an unreasonable condition of probation where he fails to object at sentencing. (*People v. Welch, supra*, 5 Cal.4th at pp. 234-237.) However, a defendant does not forfeit his right to appeal "obvious legal errors at sentencing that are correctable without referring to factual findings in the record," regardless of whether the defendant timely objected. (*People v. Smith, supra*, 24 Cal.4th at p. 852.)

In this case, the court failed to set forth the statutory bases of the fines and fees it ordered Markham to pay. This failure presents an obvious legal error, because the \$2,674 total in fines and fees is facially inconsistent with the statutory penalty for Markham's D.U.I.. Accordingly, we hold Markham did not forfeit his right to raise this issue on appeal.

## DISPOSITION

The case is remanded to the trial court, and the court shall prepare an amended probation minute order specifying the statutory bases for all fines, fees, and penalties imposed upon Markham. In all other respects the judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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NARES, J.

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IRION, J.